MOTION FILED

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No. 92-728

In The

Supreme Court of the United States

October Term, 1992

TWIN CITY FIRE INSURANCE CO., *et al.*,

Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

Respondent.

On Petition For A
Writ Of Certiorari To The
Supreme Court Of New Jersey

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF INSTITUTE FOR JUSTICE, CITIZENS FOR A SOUND ECONOMY, COMPETITIVE ENTERPRISE INSTITUTE, HEARTLAND INSTITUTE, AND PIONEER INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE ATTACHED BRIEF AMICI CURIAE

The Institute for Justice, Citizens for a Sound Economy, the Competitive Enterprise Institute, the Heartland Institute, and the Pioneer Institute move for leave to file the attached brief *amici curiae* in support of the petition in this case. Petitioners consented to the filing of this brief. Respondents refused to consent without reviewing the contents of the brief in advance, a condition which *amici* declined to accept, making this motion necessary.

Each of the *amici* is a nonprofit organization that conducts some combination of research, public education, legislative advocacy, and litigation in support of a common ideal: the protection and preservation of a free market economy and a republican form of government. None of the *amici* is affiliated, directly or indirectly, with the insurance industry (or any other economic interest group). The Institute for Justice is a nonprofit, public interest legal foundation dedicated to securing full constitutional protection for economic liberty, private property rights, and freedom of speech. Citizens for a Sound Economy is a 250,000-member, nonpartisan, nonprofit citizen advocacy group that promotes market-based solutions to public policy problems to achieve economic freedom and opportunity for all people. The Competitive Enterprise Institute is a nonprofit organization dedicated to advancing public understanding of the hidden costs of government over-regulation. The Heartland Institute serves the nation's 8,000 governors, state legislators, and state constitutional officers by providing them with objective research on state and local public policy issues. The

Pioneer Institute for Public Policy Research is a Massachusetts based tax-exempt organization that is supportive of market-based alternatives to many governmental initiatives and programs in Massachusetts.

By filing this brief, *amici* wish to emphasize that the issue in this case is not merely the problem of one company, or even of one industry, but is of widespread importance to our economic system and the structure of legal rights. We believe that the right of exit at issue in this case is preservative of every other right – and especially of the rights of shareholders and customers in other states, who have no voice or vote in New Jersey, but who are the targets of this oppressive legislation. They have no way to protect themselves from oppressive measures except to leave. We wish to bring this broader perspective to bear on this Court's consideration of the case. Accordingly, we seek leave to file this brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the United States Constitution protects the right of an individual or corporation to refuse to do business within a state.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTERESTS OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

ARGUMENT 6

I. THE RIGHT OF EXIT IS A LIBERTY PROTECTED UNDER THE DUE PROCESS CLAUSE 7

A. The Right Of Exit Is Fundamental To Federalism As A Structural Safeguard For Liberty... 8

B. The Right To Choose Whether To Conduct A Particular Business In A Particular State Is Inherent In The Very Idea Of Free Government 11

C. The Right Of Exit Is Deeply Rooted In The Customs And Traditions Of This Nation, And Has Been Recognized By This Court.. 13

II. THE CONSTITUTIONAL RIGHT OF EXIT IS PLAINLY IMPLICATED BY THE ORDER UNDER REVIEW 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Aptheker v. Secretary of State, 378 U.S. 500 (1964)..... 7

Armstrong v. United States, 364 U.S. 40 (1960)..... 19

Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990)..... 12

Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920)..... 16

Brock v. Roadway Express, 481 U.S. 252 (1987)..... 12

CalFarm Insurance Co. v. Deukmejian, 771 P.2d 1247 (Cal. 1989)..... 7

Corfield v. Coryell, 6 Fed. Cas. 546 (E.D. Pa. 1823)..... 11

De Vitis v. New Jersey Racing Comm'n, 495 A.2d 457 (N.J. Super. App. Div.), *cert. denied*, 508 A.2d 213 (N.J. 1985)..... 4

FCC v. Florida Power Corp., 480 U.S. 245 (1987)..... 17

First National Bank of Boston v. Belotti, 435 U.S. 765 (1978)..... 12

Fort Smith Light & Traction Co. v. Bourland, 267 U.S. 330 (1925)..... 17

Fresh Pond Shopping Center v. Callahan, 464 U.S. 875 (1983)..... 17

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977)..... 13

Gibbons v. United States, 660 F.2d 1227 (7th Cir. 1981)..... 16

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991)..... 9

TABLE OF AUTHORITIES – Continued

Page

Grosjean v. American Press Co., 297 U.S. 233 (1936) .11, 12

Hartford Accident & Indemnity Co. v. Ingram, 226 S.E.2d 498 (N.C. 1976) 6

Hebert v. Louisiana, 272 U.S. 312 (1926) 11

Kaiser Aetna v. United States, 444 U.S. 164 (1979). 12

Lewis v. Safeco Insurance Co., 414 N.Y.S. 2d 823 (1978) 6

Maryland Casualty Co. v. Commissioner of Insurance, 363 N.E.2d 1087 (Mass. 1977) 6

Meyer v. Nebraska, 262 U.S. 390 (1923) 8

Michael H. v. Gerald D., 491 U.S. 110 (1989) 8, 13

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 13

Munn v. Illinois, 94 U.S. 113 (1876) 15, 17

New York Times v. Sullivan, 376 U.S. 254 (1964) 12

New Jersey Department of Environmental Protection v. Atlantic States Cast Iron Pipe Co., 575 A.2d 457 (N.J. Super. App. Div. 1990) 4

Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243 (1906) 16

Palko v. Connecticut, 302 U.S. 319 (1937) 11

Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) 7

Railroad Comm'n v. Eastern Texas R.R., 264 U.S. 64 (1924) 16

TABLE OF AUTHORITIES – Continued

Page

Santa Clara County v. Southern Pacific R.R., 116 U.S. 394 (1886) 12

Shapiro v. Thompson, 394 U.S. 618 (1969) 14

Sheeran v. Nationwide Mutual Ins. Co., 404 A.2d 625 (N.J. 1979) 3

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 8

Snyder v. Massachusetts, 291 U.S. 97 (1934) 13

Southern Ry. v. North Carolina, 376 U.S. 93 (1964) 17

Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137 (1960) 17

Textile Workers v. Darlington Co., 380 U.S. 263 (1965) 13

Turner v. Safley, 482 U.S. 78 (1987) 8

Twining v. New Jersey, 211 U.S. 78 (1908) 11

United States v. Guest, 383 U.S. 745 (1966) 8

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 12

United States v. White, 322 U.S. 694 (1944) 12

Whitney v. California, 274 U.S. 357 (1927) 7

Wolff Co. v. Industrial Court, 262 U.S. 522 (1923) 16

Yee v. City of Escondido, 112 S. Ct. 1522 (1992) 16, 17

Zobel v. Williams, 457 U.S. 55 (1982) 8, 9, 10, 14

TABLE OF AUTHORITIES – Continued

Page

MISCELLANOUS:

Articles of Confederation 14

W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. 1 (G. Chase, ed. 1878) 14, 15

Z. Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956) 14

T. Dye, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) 10

Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of Law & Econ. 23 (1983) 10

Epstein, *Exit Rights Under Federalism*, 55 Law & Contemp. P. 147 (1992) 9

A. Hamilton, THE FEDERALIST, No. 28 9

F. A. Hayek, *The Economic Conditions of Interstate Federalism*, in INDIVIDUALISM AND ECONOMIC ORDER (1948) 9

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TABLE OF AUTHORITIES – Continued

Page

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A. Smith, THE WEALTH OF NATIONS, Bk. I (Univ. of Chicago Press ed. 1976) 15

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Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956) 10

UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 13. 11

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BRIEF OF INSTITUTE FOR JUSTICE, CITIZENS FOR A SOUND ECONOMY, COMPETITIVE ENTERPRISE INSTITUTE, HEARTLAND INSTITUTE, AND PIONEER INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIORARI

INTERESTS OF AMICI CURIAE

The interests of the *amici* are set forth in the motion for leave to file a brief *amici curiae*

STATEMENT OF THE CASE

This case arises out of an attempt by the State of New Jersey to prevent certain private businesses from leaving the state, so it can force them to bear the costs of the legislature's regulatory mistakes. In 1983, the legislature

passed the "Automobile Full Insurance Availability Act," the provisions and results of which are described by the state Supreme Court at Pet. App. A8-A10. The essential premise of the legislation was that high risk drivers should be provided insurance at rates equivalent to lower risk drivers, notwithstanding their higher costs. This was accomplished through establishment of the Joint Underwriting Association (JUA), a governmental entity that provided insurance to high risk drivers. The JUA was administered by the private auto insurance carriers of the State, which were assured that they "were to be insulated" from any "claims and liabilities" that might arise from the operations of the JUA. Pet. App. A9.

Since the premiums charged to high risk drivers would be inadequate (because they were charged no more than lower risk drivers), the "Reform Act" subsidized the JUA through revenue from traffic violations and drunk driving convictions and from surcharges on ordinary auto insurance policies. Pet. App. A9. Even these sources of revenue proved insufficient, and more and more drivers were attracted into the JUA. By 1988, over half of all New Jersey drivers were covered by the JUA, and the supplemental revenues lagged far behind the cost of providing subsidized insurance. Pet. App. A10. By 1990 the JUA had amassed a deficit of over $3.3 billion in unpaid claims and other losses.

The legislature then attempted retroactively to shift a large portion of this multi-billion dollar deficit onto the insurance companies. In the so-called "Reform Act" of 1990, the legislature imposed assessments totalling $160 million per year on property-casualty insurers and an additional 5% surtax on personal auto insurance premiums, anticipated to raise $300 million per year. Pet. App. A11-A12. Significantly, the insurance carriers were forbidden to pass on the cost of either the assessment or the surtax to their customers; these payments were to be

borne by the shareholders, most of whom are out-of-staters.

The "Reform Act" also retroactively restricted the right of insurance companies to withdraw from the New Jersey market, which is the issue in this case. Under prior law, insurance companies had a protected right to cease to do business in the State, provided they surrendered their license. *Sheeran v. Nationwide Mutual Ins. Co.*, 404 A.2d 625, 630 (N.J. 1979). Section 72 of the "Reform Act," however, forbade surrender of a license without advance permission from respondent.

While the proposed "Reform Act" was under consideration by the legislature, officials at petitioner, Twin City Fire Insurance Company, calculated that it would sustain underwriting losses of more than $46 million over the ensuing three years if the Act passed. Pet. App. A6. It therefore decided to withdraw entirely from the business of automobile insurance in the State, and surrendered its license on March 7, 1990. Five days later, the "Reform Act" was signed into law. Pursuant to the retroactive authority of Section 72, respondent sought and obtained an injunction requiring the company to rescind its notices of withdrawal and to submit a "plan for orderly withdrawal" in conformity with the new Act.

Twin City proposed a plan of withdrawal, under which it would withdraw from the market over a one-year period by nonrenewal of policies, would guarantee existing liabilities, and would submit to regulatory oversight in the interim period. Pet. App. A68. Respondent, however, imposed some 14 additional "conditions," including conditions that effectively precluded withdrawal. The most significant of these conditions were

- *The five year condition*. Respondent required Twin City to continue to provide insurance for all of its policyholders for five years (unless it could place the business with other insurers, which is not a viable possibility).

- *The new business condition.* During this five year period, respondent required Twin City to take on additional business. The losses during this five year period are projected to total approximately $100 million.
- *The other business condition.* At the end of the five year period, Twin City must forfeit its licenses to issue other lines of insurance in the State of New Jersey. This business totalled more than $37 million in 1991. Business licenses are recognized as property under New Jersey law.[1]
- *The forfeiture condition.* At the end of five years, the seven other separately incorporated insurance companies owned by Twin City's parent corporation, ITT Hartford, must forfeit all their insurance licenses in the State of New Jersey. This business totalled more than $125 million in 1991.

Pet. App. A6-A7.

Twin City challenged respondent's order in state court, claiming – among other legal arguments – that the decision violated its federal constitutional rights under the Takings Clause and the Due Process Clause by putting it to the choice of either forfeiting its constitutionally protected liberty of ceasing to do business in the State or suffering a taking of its property without just compensation.

The state Supreme Court upheld respondent's order. The court rejected petitioner's substantive due process argument, finding that the requirement to continue in business for five years against its will "is hardly an onerous one" (Pet. App. A17) and that the requirement to

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[1] *New Jersey Department of Environmental Protection v. Atlantic States Cast Iron Pipe Co.*, 575 A.2d 457, 462 (N.J. Super. App. Div. 1990); *De Vitis v. New Jersey Racing Comm'n*, 495 A.2d 457, 462 (N.J. Super. App. Div.), *cert. denied*, 508 A.2d 213 (N.J. 1985).

take on additional business "is not only rational and fair but virtually required by the Act." *Id.* at A18. The court reasoned that to permit "an insurer who enjoyed profitable operations during the pre-Reform Act period" to "abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers" would be "inequitable." *Id.* The court upheld the license forfeiture provisions expressly on the ground that this would "discourage[] withdrawal":

> In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective. If the forfeiture condition discourages withdrawal, a substantial State interest – retention of private-passenger insurers – will have been advanced.

Pet. App. A20.

The court similarly rejected the Takings Clause challenge to the forfeiture condition. The court did not deny that petitioner's business licenses and attendant goodwill are a property right under state law. See Pet. App. A28 ("the property affected by the regulation is the value of the Twin City affiliates' New Jersey insurance business"). The court suggested, however, that takings of "commercial property interests," unlike real property, generally require no compensation. *Id.* at A26. Finding that there was no "physical invasion" of petitioner's intangible property, the court balanced "the private interests affected by the regulation against the public interests that are advanced." *Id.* at A27. In that connection, the court reiterated its point that "the forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger market." *Id.* at A27. Thus, the Takings Clause analysis and the Due Process Clause analysis come down to the same

point: may a State impose substantial financial penalties on an individual or corporation to prevent it from ceasing to do business in the State?

ARGUMENT

This case raises a constitutional question of extraordinary importance to our structure of government and market economy: May a state force a person or corporation to continue to do business within the state against its will? *Amici* submit that the right to exit or withdraw from doing business in a state is fundamental to our system of federalism; that it is one of the fundamental principles of liberty and justice which inhere in the very idea of free government; that it is deeply rooted in the customs and traditions of the Nation; and – alarmingly – that it is now under assault by states that hope to evade the adverse consequences of their own regulatory blunders by entrapping nationwide companies and forcing them to bear the costs. New Jersey's "Reform Act" is a direct assault on the exit right, justified by no governmental interest other than to force the company to pay ransom.

The courts of four states have confronted this question and have rendered conflicting decisions. The Supreme Court of New Jersey in the decision under review, plus the Supreme Judicial Court of Massachusetts in *Maryland Casualty Co. v. Commissioner of Insurance*, 363 N.E.2d 1087 (Mass. 1977), upheld state efforts to prevent insurance companies from withdrawing from their respective states. The courts of North Carolina and New York invalidated such efforts. *Hartford Accident & Indemnity Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976); *Lewis v. Safeco Insurance Co.*, 414 N.Y.S. 2d 823 (1978). The California Supreme Court upheld an insurance regulation scheme on the premise that the companies were adequately protected by their right to withdraw from the

State. *CalFarm Insurance Co. v. Deukmejian*, 771 P.2d 1247, 1262 (Cal. 1989). This case provides a clear and unambiguous opportunity for affirmation of the right of every person to choose whether to do business within a state.

We are not asking this Court to become the arbiter of the fairness or wisdom of economic legislation. This case is not about economic fine-tuning: the right of exit in our federalist system, like the separation of powers, is best understood as a *structural* protection for liberty. The right of exit is vital not just in itself, but as a check and safeguard for every other right. If persons are free to move from state to state, or to withdraw from particular activities altogether in response to oppressive state legislation, intrusive judicial review of such legislation will be unnecessary; the right of exit will protect against oppression. See *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring). But if there is no right of exit – no right to withdraw one's services in response to oppressive state legislation – then the practical ability of states to oppress their people will be vastly advanced, and the demands for detailed judicial review correspondingly increased. Berlin Walls are built for a purpose.

I. THE RIGHT OF EXIT IS A LIBERTY PROTECTED UNDER THE DUE PROCESS CLAUSE

The right to choose whether to do business within a particular state is not mentioned in so many words in the text of the Constitution. But this Court has long recognized that – in Justice Brandeis's words – "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion). Enumerated rights are not the only rights given constitutional protection; other rights traditionally recognized by our society are entitled to protection as well. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-06 (1992)

(plurality opinion); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-24 (1989); *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923). In particular, this Court has extended constitutional protection to rights inherent in our structure of government, to rights that are essential to a free society, and to rights deeply rooted in our legal tradition. The right of each person (including corporations) to choose whether to conduct a particular business within a particular state satisfies each of these criteria.

A. The Right of Exit Is Fundamental To Federalism As A Structural Safeguard For Liberty

The right of all persons, including corporations,[2] to move from state to state and determine for themselves whether to do business therein inheres in the federal structure of our Constitution. *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (plurality opinion) (deriving the "principle of free interstate migration" from the logic of a "document that transformed a loose confederation of states into one nation"); *United States v. Guest*, 383 U.S. 745, 757-58 (1966); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (listing interstate mobility as among the "implied guarantees of [the] Constitution" that "owe their existence to the Federal government, its National character, its Constitution, or its laws"). The right of exit imposes a natural, structural limitation on the ability of states to oppress those within their jurisdiction. If a person is free to exit, the state can impose burdens on that person only up to the point that the burdens equal the marginal benefit to the person of remaining in the state. Beyond that point, he will leave. If the State can prohibit

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[2] There can be no doubt at this late date that corporations are "persons" within the meaning of the Due Process Clause. See page 12, *infra*.

exit, however, he is vulnerable to whatever burdens or oppression the State may heap upon him. The right of exit – the right to vote with one's feet – is thus an essential backstop to the democratic process as a safeguard against oppression. See Albert O. Hirschman, EXIT, VOICE, AND LOYALTY (1970); Richard B. Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 923-27 (1985); Richard A. Epstein, *Exit Rights Under Federalism*, 55 Law & Contemp. P. 147 (1992).[3]

As this Court has noted, "the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). From the time of the Founding, it has been thought that "the new federalist system would suppress completely 'the attempts of the government to establish a tyranny.' " *Id.* at 2400, quoting THE FEDERALIST, No. 28, at 180-81 (A. Hamilton). See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1503-04 (1987); Andrez Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380-91. But, as noted in *Gregory*, this depends on the existence of a "mobile citizenry." *Gregory*, 111 S. Ct. at 2399; see also *Zobel*, 457 U.S. at 68 (Brennan, J. concurring). If citizens cannot exit in response to oppressive measures, federalism serves no rights-protective purpose. Decentralization without mobility leads only to balkanization and petty fiefdoms. See F. A. Hayek, *The Economic Conditions of Interstate Federalism*, in INDIVIDUALISM AND ECONOMIC ORDER (1948); F. A. Hayek, THE CONSTITUTION OF LIBERTY 184-85 (1960).

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[3] Of course, exit rights are an *incomplete* protection against oppressive state measures in that the cost of exit (whether because of fixed investments, sentimental attachments, or lack of financial resources or opportunities) may be so high that exit is not a realistic option, and additional protections for liberty are necessary. See Epstein, *supra*, at 150-54.

Moreover, the protection accorded by the right of exit benefits not just the person who exits, but others who remain – who are protected by the *threat* of exit. A government must be restrained in its treatment of those within the jurisdiction if it knows that oppressive measures will cause withdrawal of individuals and businesses from the State. This acts as a powerful disincentive to oppressive or exploitative policies. In fact, the economic model of federalism shows that the existence of a large number of jurisdictions, coupled with a mobile citizenry, not only reduces the danger of government abuse but affirmatively creates competition among the states for more efficient and popular government. The classic exposition of this, presented in the context of achieving efficient levels of taxation and public spending, is Charles Tiebout's much-cited article, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). More recent explorations of this theme can be found in such works as Dennis Mueller, PUBLIC CHOICE II 154-63 (1989); Daphne A. Kenyon & John Kincaid, eds., COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (1991); Thomas R. Dye, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990); Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of Law & Econ. 23, 33-35 (1983). The genius of federalism is that states and localities are forced to compete among themselves by offering superior mixes of taxes and services, and by avoiding abusive and unpopular measures. Justice Brennan has described this competition as a "healthy rivalry" that "inheres in the very idea of maintaining the States as independent sovereigns within a larger framework." *Zobel*, 457 U.S. at 68 (concurring opinion). But if citizens are not free to come and go, the competitive mechanism does not work. Tiebout, *supra*, at 420-22; Mueller, *supra*, at 155. A state with the ability to prohibit exit is like the holder of a monopoly over an

essential good: it can exploit its customers and has no incentive to improve price, quality, or service.

The right of each person (including corporations) to exit from a state in response to governmental abuse, or for any other reason, is thus an essential aspect of our federalist constitutional structure, and warrants strong constitutional protection.

B. The Right To Choose Whether To Conduct A Particular Business In A Particular State Is Inherent In The Very Idea Of Free Government

The constitutional right at stake in this case is an amalgam of two rights, each recognized as essential to free governments and free economies. First is the right to decide what business to engage in, or whether to engage in business at all. To force a person to continue to ply a trade against his will is a monstrous invasion of personal liberty, akin to involuntary servitude, and justly condemned by free governments everywhere. Second is the right to exit from a particular jurisdiction and go elsewhere. This right has often been denied by oppressive regimes, but never by a free government. It is no exaggeration to say that it is impossible to conceive of a free government or a free economy that does not recognize and honor these rights. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The right to exit is a clear example of "one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' and, as such, is embodied in the concept 'due process of law.' " *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936), quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926), and *Twining v. New Jersey*, 211 U.S. 78, 99 (1908); *Corfield v. Coryell*, 6 Fed. Cas. 546 (E.D. Pa. 1823) (including within definition of "fundamental" rights those "which belong, of right, to the citizens of all free governments"). See *Universal Declaration of Human Rights*, Art. 13.

The only reason these principles may not seem obviously applicable here is that petitioners are corporations rather than individuals. If an individual insurance agent (or butcher, or baker, or candlestick-maker) were told he had to continue to do business in New Jersey, such an order would be universally recognized as a violation of fundamental freedoms. Corporations do not naturally excite such sympathy. But this Court has held for over 100 years that corporations are "persons" within the meaning of the Fourteenth Amendment, entitled to the protections accorded the individual. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 780 n.15 (1978); *Grosjean, supra*, 297 U.S. at 244; *Santa Clara County v. Southern Pacific R.R.*, 116 U.S. 394 (1886). Since no one would question the existence and importance of this right in the case of a natural person, it follows that it is protected in the case of a corporation.

To be sure, the issue might be different if the interests of the state were directly related to the corporate form of the entity that is the target of the state's order. See *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397-98 (1990). But petitioners' corporate form has no relevance to the regulatory measures here. Similarly, the issue might be different if the constitutional right in question were "purely personal" (*First National Bank of Boston, supra*, 435 U.S. at 778-79 n.14), such as the privilege against self-incrimination (*United States v. White*, 322 U.S. 694, 698-701 (1944)). But there is nothing "personal" about the freedom to do business (or not to do business) in a particular state; indeed, the arguments for mobility apply with full force to corporations. If corporations are entitled to freedom of speech (*First National Bank of Boston, supra; New York Times v. Sullivan*, 376 U.S. 254 (1964)), property (*Kaiser Aetna v. United States*, 444 U.S. 164 (1979)), protection against double jeopardy (*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)), procedural due process (*Brock v. Roadway Express*, 481 U.S.

252 (1987)), and protection against unreasonable searches and seizures (*G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977)), there is no reason in logic or history that they should not be entitled to the freedom to choose whether to engage in a particular business in a particular state.

C. The Right Of Exit Is Deeply Rooted In The Customs And Traditions Of This Nation, And Has Been Recognized By This Court

The most widely accepted test for determining whether an asserted liberty, not otherwise enumerated in the text, is entitled to constitutional protection is whether it is "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Whether other freedoms, less firmly rooted in the tradition, may also be entitled to protection is a matter of dispute (see *Michael H.*, 491 U.S. at 137-41 (Brennan, J., dissenting)), but no member of this Court in recent times has disputed that at least the rights firmly rooted in this nation's legal tradition are protected under the Due Process Clause.

The right to refuse to do business within a state against one's will is one of the clearest possible examples of such a right. Not only do the rights to decide for oneself what business or occupation to pursue and where to pursue it have deep roots in the historical experience of this nation; this right has been explicitly recognized by this Court. If the right has not more frequently been the subject of constitutional litigation, this is because the right is *so* fundamental, *so* deeply rooted, that few states have ever been so bold as to deny it. As this Court stated in *Textile Workers v. Darlington Co.*, 380 U.S. 263, 270 (1965), the "proposition that a single businessman cannot

choose to go out of business if he wants to would represent . . . a startling innovation."

William Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, the most cited and revered legal work among the American founders, stated that the right "of changing situation, or moving one's person to whatsoever place one's own inclination may direct" is a "right strictly natural" that "the laws of England have never abridged . . . without sufficient cause." *Id.*, Bk. 1, ch. 1, at *134 (G. Chase, ed. 1878). To the Americans, the right was more than theory: it was experience. The freedom to leave a state in response to unwelcome or oppressive governmental acts was literally the first freedom exercised by our forebears as they fled religious persecution in England and came to these shores.

The importance of this freedom to the American constitutional tradition can be seen in its express inclusion in two of our earliest charters of freedoms – the Rhode Island Charter and the Massachusetts Body of Liberties. See Zechariah Chafee, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 177-78 (1956); see also *Zobel*, 457 U.S. at 79 n.9 (O'Connor, J., concurring). The Articles of Confederation carried forth this tradition, recognizing a right of "free ingress and regress to and from any other State." Art. of Confed., Art. IV. Significantly, the language of Article IV of the Articles shows that this principle had particular reference to "trade and commerce." *Id.* The principle of "free ingress and regress" remains a cherished part of our constitutional liberty today. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); *Zobel, supra*. As the nations of Western Europe move toward open borders for economic activity, it would be ironic if the states of the United States were permitted to undo our centuries-old tradition of open internal borders and internal movement.

The second aspect of the liberty at issue in this case – the right to choose whether to engage in a particular

occupation or business – likewise has ancient roots in the common law. Blackstone, *supra*, Bk. I, ch. 4, at *427 ("[a]t common law, every man might use what trade he pleased"); Adam Smith, THE WEALTH OF NATIONS, Bk. I, ch. 10, pt. 2, at 136 (Univ. of Chicago Press ed. 1976) (to "hinder" a man "from employing [his] strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of [his] most sacred property"). But it attained particular salience within our tradition through the experience of slavery and the "free labor" tradition that opposed and eventually unseated it. The concept of "liberty" in the Fourteenth Amendment, born of the opposition to slavery, is infused with the understanding that enforced service is antithetical to the American ideal. Thus, Abraham Lincoln stressed that each man has "a freedom to choose the mode of his work and the manner of his employer." Abraham Lincoln, SPEECHES AND WRITINGS 1859-1865, at 84 (Library of America 1989) (speech at Cincinnati, Ohio, Sept. 17, 1859). Of course, this (as with many aspects of liberty) has its greatest intuitive force in the case of natural persons. But as discussed above, the liberties of natural persons, with the exception of those that are "purely personal," have been extended to corporations as well.

This Court, too, has long recognized the right to withdraw from business as the ultimate protection against abuse of governmental power. The state has the authority to regulate, but it does not have the power to force any person to continue to conduct business when he believes the regulation has become intolerable. In *Munn v. Illinois*, 94 U.S. 113 (1876), this Court's first occasion to consider the effect of the newly ratified Fourteenth Amendment on the power of the states to regulate the rates and terms of business, the Court acknowledged a broad power to regulate businesses clothed with a public interest, but at the same time recognized the right of the regulated party to withdraw:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use*; but, so long as he maintains the use, he must submit to the control.

Id. at 126 (emphasis added). The Court applied this principle to the business of insurance in *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906). In an opinion by the first Justice Harlan, the Court held that the state has broad power to regulate the insurance industry, but insisted: "If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is its privilege to cease doing business." *Id.* at 254-55.[4]

The Court recently reaffirmed this principle in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992). *Yee* involved the constitutionality of a rent control ordinance on mobile home sites, coupled with a law granting tenants the right to remain indefinitely and to assign their tenancy to others. The Court upheld the ordinance, but expressly noted that "[a]t least on the face of the regulatory scheme,

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[4] Other cases reiterating the right to exit include *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396 (1920); *Railroad Comm'n v. Eastern Texas R.R.*, 264 U.S. 64 (1924); and *Wolff Co. v. Industrial Court*, 262 U.S. 522, 540-41 (1923). It would be a mistake to suppose that these decisions were nothing more than aspects of the discredited substantive due process theories of the *Lochner* era. Some of the opinions were written by the dissenters in *Lochner* (Justice Holmes wrote *Brooks-Scanlon* and the first Justice Harlan wrote *Northwestern Life*.). Indeed, the exit right was typically invoked as part of the justification for *upholding* economic regulation. For discussion of the current vitality of the doctrine in the railroad context, see *Gibbons v. United States*, 660 F.2d 1227, 1233-34 (7th Cir. 1981).

neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 1528. This was based on the fact that the landlord was permitted to evict his tenants if he wished to change the use of his property. Thus, the fundamental right to exit the business altogether was preserved. The Court stated that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 1529. It is important to stress that in both *Munn* and *Yee*, as well as the intervening cases, the business owner's constitutional rights were *not* limited to the right to obtain just and reasonable rates. In addition, the owners enjoyed the privilege of abandoning the business, if they so chose. See also *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 n.6 (1987); *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting).

A limited exception to this principle has been recognized in the case of public utilities providing a service to the public under a certificate of public convenience and necessity. In such circumstances, the government has a recognized authority to forbid abandonment of the service to the public, at least where the enterprise as a whole is guaranteed a fair rate of return. *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330 (1925); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960); *Southern Ry. v. North Carolina*, 376 U.S. 93 (1964). But in these cases, the obligation to continue in service was "voluntarily assumed" (*Bourland*, 267 U.S. at 332) in exchange for particular privileges, usually including protection from competition. The public confers monopoly privileges on a firm in order to secure universal and reliable service at average cost, and is entitled to the benefit of its bargain. New Jersey has conferred no monopoly privileges on petitioner, and petitioner did not "voluntarily assume" any obligation to remain.

II. THE CONSTITUTIONAL RIGHT OF EXIT IS PLAINLY IMPLICATED BY THE ORDER UNDER REVIEW

There can be no question that the constitutional right to exit is burdened by the order under review in this case. The five year condition explicitly precludes exit for a lengthy period of time (estimated to cause losses of $100 million), and the forfeiture conditions effectively make the restriction on exit perpetual. In effect, the State proposes to punish Twin City and its affiliated companies by a loss of over $160 million in annual revenues if the company withdraws from the automobile insurance market. The New Jersey Supreme Court admitted that the "economic impact is potentially quite severe" (Pet. App. A30), but averred that "strong medicine" was necessary in order to "discourage withdrawal." *Id.* at A20. If a state may impose so substantial a penalty for no purpose other than to discourage the exercise of the right, the constitutional right of exit is meaningless.

The only interest the State has in preventing exit is to coerce the shareholders of automobile insurance companies into shouldering financial obligations that were caused by the regulatory ineptitude of the state legislature.[5] These costs, like any other costs of maintaining

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[5] There is no plausible argument in this case that the exit restraint is needed either to ensure that the companies will continue to fulfill their contractual obligations incurred in past years or to prevent disruption in insurance markets. Petitioners' "plan for orderly withdrawal" provided for the payment of claims on past policies, and respondent has not questioned the adequacy of the plan in that respect. As to preventing disruption, the four conditions under challenge actually exacerbate any dislocation that might be caused by petitioners' withdrawal from the market. The new business condition means that more New Jersey drivers will be forced to seek alternative insurers at

state government, "in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)) – not by selected targets of convenience. It is not irrelevant to the political logic of the state's scheme that the burdens must be passed on to shareholders and customers in other states, and may not be reflected in the rates charged to New Jersey policyholders. The right of exit is especially important to those who are not represented in the legislature. There is scant constitutional limit on the level of taxation the state may impose on this business, but it is unconstitutional for the state to take away the one remaining right of self-preservation: the right to get out and go elsewhere, without punishment or penalty.

If states are free to impose oppressive levels of taxation and regulatory burdens on persons and corporations, and then to impose "severe" penalties on them for departing, there is nothing left of one of the most foundational of our constitutional rights. If the decision below is allowed to stand, state legislatures and state courts will surely seize the opportunity to exploit nationwide businesses by blocking exit, and one of the key structural features of our constitutional order will be imperiled. Review by this Court is necessary to define and enforce the constitutional right of every person to refuse to do business in a state against his will.

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the end of the five year period; and the other business and forfeiture conditions needlessly disrupt other lines of insurance for no reason other than to punish the exercise of the right to exit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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